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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 599

O. B. BRUNO, WILLIAM NEFF, SAM IANNUZZI and STEPHEN ZIELINSKI, alias STEVE ZIELINSKI,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA AND APPENDIX

MARJORIE HANSON MATSON,
Attorney for Petitioners,
1706 Law & Finance Building,
Pittsburgh, Pennsylvania 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CAPLYN DRIVE, PITTSBURGH 36, PA. 881-7463

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

O. B. BRUNO, WILLIAM NEFF, SAM IANNUZZI and STEPHEN ZIELINSKI, alias STEVE ZIELINSKI, petitioners herein, respectfully pray that a writ of certiorari issue to review the decision of the Superior Court of the Commonwealth of Pennsylvania made and entered June 11, 1964 sustaining their convictions, which decision the Pennsylvania Supreme Court on July 31, 1964 refused to review. State remedies have now been exhausted.

Opinions Below

The opinion of the Court of Quarter Sessions of the Peace of Allegheny County, Pennsylvania was not reported but is printed in petitioner's state court brief and record (R. 1a). The Superior Court's opinion is reported in 203 Pa. Super. 541 and in 201 A. 2d 434. The Supreme Court of Pennsylvania entered an order dismissing the petition for allowance of appeal without opinion. Copies of the opinion of the Superior Court and of the order of the Supreme Court are annexed to this petition as Appendix I.

Jurisdiction

(I) The decision sought to be reviewed was entered June 11, 1964.

(II) The petition for allowance of appeal from the judgment of Superior Court was denied by the Supreme Court of Pennsylvania on July 31, 1964. No order has been sought or granted to extend the time within which to petition for certiorari.

(III) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C., Section 1257 (3).

Questions Presented for Review

Does the action of the state court in admitting into evidence recordings of telephone conversations between two of these petitioners and another, made without petitioners' knowledge and consent and in violation of federal and state statutes and regulations, constitute state action depriving these petitioners of due process of law?

Should the exclusionary rule of *Mapp v. Ohio* be applied where the evidence used in the state court was obtained illegally rather than unconstitutionally?

Should *Olmstead v. United States* be overruled?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, Section I "* * * nor shall any state deprive any person of * * * liberty * * * without due process of law".

Communications Act of 1934, 47 U. S. C. 605, c. 652, 48 Stat. 1103. See Appendix page 35.

Pennsylvania Anti-Wiretapping Act, Act of July 16, 1957, P. L. 956, 15 P. S. 2443. See Appendix page 34.

Statement of the Case

Petitioners, elected Councilmen of the borough of Sharpsburg, Pennsylvania were found guilty in the state court of numerous charges of extortion and of misdemeanor in office, all of said charges arising in the years 1956 to 1958. The indictments charged that each of the petitioners at various times received "kick-backs" from the contractor who had been awarded the contract for the delivery of coal to the borough power plant.*

The coal contractor, one Frank "Gyp" Panza, testified that he had agreed to pay petitioners Iannuzzi and Neff twenty-five cents a ton for coal delivered to the borough and that he paid this amount thereafter to various of the Councilmen during the three years in question. Panza admitted that the coal contracts had been legally and prop-

* The record on appeal in the state court was not printed except for the opinion of the lower court, which appears in the Brief and Record for Appellants.

erly awarded to him as the lowest responsible bidder and that under the contract penalties were to be assessed when the coal failed to meet specifications.

Determination of the amount of the penalties was on the basis of an anaylsis made each month by Pittsburgh Testing Laboratory, an impartial agency whose reliability was not disputed. Borough records established that penalties were assessed against Panza fairly regularly for failure to meet specifications and that, except in one situation discussed hereafter, there was no significant variation in the amount of penalties whether the sample on which the analysis was based was taken by the Borough Engineer or by the Pittsburgh Testing Laboratory. No evidence was offered to establish that petitioners had tampered with the samples or had opportunity to do so. The amount of the penalties was determined by the Borough Engineer and the Solicitor each month in accordance with a formula set forth in the contract. The Commonwealth's contention was that petitioners used their power as Councilmen to affect the assessment of penalties as a basis for extorting money from the coal contractor.

In December 1957, after Panza allegedly had been paying "kick-backs" for approximately a year and a half, the Borough Council, based upon the Pittsburgh Testing Laboratory analysis, assessed a penalty of $3,800. When Panza protested an investigation was made and, after advice from the Borough Engineer and the Solicitor, Council remitted the penalty. Production records from the power plant were offered by the Commonwealth to prove that the sample on which the analysis was based could not have fairly represented the coal actually delivered. Panza testified that petitioner Bruno and another Councilman, who is not a party to this proceeding, demanded and received $350 each for their services in securing remission of the penalty.

Proof of the payments to petitioners rested upon the testimony of Panza, the only corroboration being the testimony of his wife and daughter as to the placing of money in bank envelopes, which Panza then allegedly delivered to petitioners.

Over strenuous objection by petitioners the Commonwealth was then allowed to introduce the testimony of one Kaminski who had been the broker on the 1955 coal contract. He testified that he had paid petitioners Neff and Bruno sums of money each month during the life of the prior contract under the threat that otherwise the samples would be tampered with and penalties imposed. The witness further testified that on several occasions he had discussed these payments on the telephone with Neff and Bruno and had recorded the conversations by holding the receiver near a microphone which was attached to a tape recorder. He did not, however, testify as to the substance of the phone conversations.

The recordings made by Kaminski were first heard by the trial judge and counsel in chambers and later, over objection played to the jury. The quality of the recordings was poor, portions being inaudible or unintelligible. The witness Kaminski was not established as having any special qualifications to make the recordings and on cross examination conceded that the tape could readily be erased in whole or in part or changed by recording over the original conversation. As heard in court, however, the tapes contained significant and damaging admissions by Bruno and Neff as to the existence in 1955 of a scheme to extort money from the prior coal contractor.

At the conclusion of the Commonwealth's case demurrers were sustained to a conspiracy charge and to certain of the

extortion charges. Petitioners then offered testimony as to the political motivation for the prosecution, which was not brought until September 19, 1960, more than two years after the last payment allegedly made by Panza. All of the petitioners emphatically denied receiving any money whatsoever from Panza, and a fifth defendant, one Orest Panza (a distant cousin of the chief prosecuting witness), said that the only money he had received was in payment for time spent in investigating the $3,800 penalty heretofore referred to. Petitioners Bruno and Neff denied that the voices heard on the recordings were theirs. Character testimony as to all of the defendants was also offered.

One other significant category of testimony offered by the defense related to the offer of the witness Kaminski to leave the country so that he would not be available to testify and produce the recordings, provided he were paid the sum of $5,000. Substantial corroboration of this blackmail attempt was developed on cross examination of Kaminski, who admitted that he did not want to testify, had talked about leaving the country and had mentioned that he would need $5,000 to do so.

Petitioners were found guilty on all of the charges which had been submitted to the jury. The Superior Court affirmed the extortion conviction but reversed as to the companion charges of misdemeanor in office. The Pennsylvania Supreme Court denied allocatur and this petition follows.

How and When Federal Questions Raised and Their Disposition Below

Questions as to the admissibility of the tape recordings were raised by specific exceptions in the course of trial. These objections were renewed by motions for a new trial,

petitioners contending specifically that the admission of the evidence in violation of federal and state law and of regulations of the Federal Communications Commission and the Pennsylvania Public Utilities Commission denied them due process of law under the Fourteenth Amendment. The motions for a new trial were refused.

On appeal to the Superior Court petitioners argued that the admission of the tape recording was in violation of the Federal Communications Act, the due process clause of the Fourteenth Amendment and of state laws and regulations. The Superior Court held that the Pennsylvania Anti-Wiretapping statute (Act of July 16, 1957, P. L. 956, 15 P. S. 2443) was not applicable and deemed it unnecessary to rule on the Public Utilities Commission regulation requiring a "beep" signal when telephone conversations are recorded, on the theory that violation of such a regulation did not raise a constitutional question. The Court did not discuss either the due process or equal protection clause specifically, but in disposing of questions arising under the Pennsylvania statute and Public Utilities Commission regulation this Court's holding in *Lopez v. United States*, 373 U. S. 427 and *Rathbun v. United States*, 355 U. S. 107 were cited. The conviction was affirmed.

In the petition for allowance of appeal filed in the Pennsylvania Supreme Court petitioners raised federal due process and equal protection questions in reference to the recordings and argued that *Mapp v. Ohio*, 367 U. S. 643 (1961) was applicable. Allocatur was refused without opinion.

Reasons for Granting the Writ

The action of the state court in admitting into evidence recordings of telephone conversations between two of these petitioners and another, made without petitioners' knowledge and consent and in violation of federal and state statutes and regulations, constitutes state action depriving these petitioners of due process of law. The exclusionary rule of *Mapp v. Ohio* should be applied where the evidence used in the state court was obtained illegally rather than unconstitutionally. *Olmstead v. United States* should be overruled. This Court has not previously determined the above questions.

This case raises questions similar to those recently before this Court in *Ferguson v. United States,* 374 U. S. 821, wherein certiorari was granted to review a decision of the Tenth Circuit Court (307 F. 2d 787), sustaining the admission into evidence of a recording of a telephone conversation made by a party to the conversation in violation of Oklahoma law and of the regulations of the Federal Communications Commission. This Court did not, however, determine the constitutional issues implicit in the facts since, at the request of the Solicitor General, the case was remanded to the Circuit Court for consideration of another question raised for the first time by petitioner's brief: 375 U. S. 962.

The instant case must be viewed against the background of public policy, both federal and state, which clearly is directed to the end of protecting the right of privacy in the area of telephone communications. As this Court is well aware, the decision in *Olmstead v. United States,* 277 U. S. 438, holding wiretapping not to be a violation of the Fourth Amendment caused widespread concern, which led to the passage of the Communications Act of 1934 (47 U. S. C. 605, c. 652, 48 Stat. 1103). This Act proscribed the interception and divulgence of telephone communica-

tions except with the consent of the sender. The public policy evidenced by the statute has been given a broad construction by this Court: *Nardone v. United States,* 302 U. S. 379; *Nardone v. United States,* 308 U. S. 338.

Section 605 of the Communications Act of 1934 is only one facet of the general public policy designed to assure privacy in the area of communications. After a two year study of the problems which had arisen in the area of telephone communications, the Federal Communications Commission on November 26, 1947, acting pursuant to its general authority to adopt regulations, entered an order designed to afford additional insurance that telephone conversations "should be free from any listening-in by others that is not done with the knowledge and authorization of the parties to the call." (See Report of the Commission, 11 F. C. C. 1050.)

The order, as modified by a subsequent order of May 20, 1948 (12 F. C. C. 1008) permits the use of recording devices in connection with interstate and foreign message toll service provided:

> "(1) That such use is accompanied by adequate notification to all parties to the telephone conversation that the conversation is being recorded."

The order further requires such notification to be given by use of an automatic tone-warning device, commonly known as a "beep". The signal must be given in all cases where a recording device is used, without limitation as to whether the device is or is not physically connected to the telephone equipment. The Report of the Commission, upon which this order is based, expressly recognizes that prior tariffs filed by telephone companies prohibiting recording of phone conversations were both unfair and unreasonable

and that legitimate use of recording devices could be consistent with the right of privacy if notice that a recording is being made is given by means of the "beep". The F. C. C. order therefore was not, as the court below suggests, simply a regulation for "the benefit of the telephone company," but rather an administrative implementation of the public policy evidenced by Section 605 of the Communications Act.

While the F. C. C. order, on its face, applies only to interstate and foreign calls, such restricted application would virtually nullify the public policy which led to its adoption. This narrow construction of congressional intent was rejected by this Court in construing the Communications Act: *Weiss v. United States*, 308 U. S. 321, holding Section 605 applicable to intrastate calls. It should likewise be rejected in interpreting the F. C. C. order, the same public policy being involved.

Even if the F. C. C. order should be considered inapplicable in this case, since intrastate calls were involved, these petitioners are protected under the similar regulations adopted by the Pennsylvania Public Utilities Commission which likewise require the automatic tone-warning to be given if a phone conversation is being recorded. The state court, however, deemed it unnecessary to rule on the effect to be given to the P. U. C. regulation, holding that, even if it had been violated, previous Pennsylvania decisions allow evidence obtained illegally to be admitted in evidence. *Mapp v. Ohio*, 367 U. S. 643, imposing the exclusionary rule if there has been a violation of a constitutional right in the procuring of the evidence, the Superior Court held did not require a different result, since a constitutional right could not be involved in a violation of a P. U. C. regulation.

The Pennsylvania Anti-Wiretapping statute (Act of July 16, 1957, P. L. 956, 15 P. S. 2443) was likewise held inapplicable, despite the fact that on its face it bars admission in evidence of recordings of phone conversations made without the consent of both parties.

The state court in rejecting the applicability of the Pennsylvania statute cited *Commonwealth v. Smith,* 186 Pa. Super. Ct. 89, 140 A. 2d 347 (1958) and *Rathbun v. United States,* 355 U. S. 107. Both of these cases involved situations where police officers listened-in to phone conversations with the consent of one of the parties to the conversation and then testified as to what they had overheard. Equating the mechanical with the human witness, the court below saw no reason for excluding the evidence.

But *Rathbun,* properly construed, does not require the Pennsylvania court to ignore the mandate of the state statute. In *Rathbun,* the granting of certiorari was expressly limited to the question of statutory construction and the result reached was based upon the interpretation of the somewhat ambiguous language of Section 605 of the Communications Act. The litigants in *Rathbun* had conceded that a party could record and publish a phone conversation and consequently that point was not at issue nor essential to the decision of the case. The footnote reference to the effect that tariff regulations which bar the use of recording devices are unjust and unreasonable did not consider the effect of the 1948 order, referred to *supra,* requiring use of the automatic tone-warning signal when a message is recorded, this not being relevant to the facts in *Rathbun.*

Review in the instant case would afford an opportunity to consider, in the context of an area specially protected

by federal and state statutes and regulations, the questions which troubled the dissenters in *Lopez v. United States*, 373 U. S. 427. Making the distinction between the human and the mechanical eavesdropper, Mr. Justice Brennan pointed out that:

> "A mechanical recording is not evidence that is merely repetitive or corroborative of human testimony. To be sure, it must be authenticated before it can be introduced. But once it is authenticated, its credibility does not depend upon the credibility of the human witness. Therein does a mechanical recording of a conversation differ fundamentally from, for example, notes that one of the parties to the conversation may have taken. A trier of facts credits the notes only insofar as he credits the notetaker. But he credits the Minifon recording not because he believes Davis accurately testified as to Lopez' statements but because he believes the Minifon accurately transcribed those statements. This distinction is well settled in the law of evidence, and it has been held that Minifon recordings are independent third-party evidence. *Monroe v. United States*, 98 App. D. C. 228, 233, 234 F. 2d 49, 55." (at p. 448)

The "independent third-party evidence" in this case—the tape recording—may easily have played the determinative role in convicting these petitioners. Almost certainly the jury regarded the incriminatory statements heard by means of the recorder as "the most reliable evidence possible." *Lopez v. United States*, 373 U. S, 427, 439.

It is not surprising that both juries and courts give this special status to recording devices since, by and large, the facts as to how they can be manipulated are not generally known. The publication of *The Eavesdroppers*, Dash, Schwartz & Knowlton (Vanguard, 1959) for the first time made available, outside of technical literature, information as to the ways in which recordings can be made to

say something completely different from that which the speaker originally said.

The human witness who lies can at least be subjected to the checks of cross examination or his testimony may be collaterally impeached. The lying mechanical witness answers no questions and where the "faking" of a recording has been skillfully done even the oscilloscope will not necessarily detect it: *The Eavesdroppers,* page 368.

One who carries on a telephone conversation may reasonably expect that his auditor may repeat it, or even that another may have overheard the conversation by means of an extension telephone. These are normal risks which can be anticipated in a society which depends upon telephonic communication. It is suggested that it is *not* reasonable to require the telephone user to anticipate that his auditor will surreptitously and illegally record the conversation and then offer this third-party evidence against him in a form "not susceptible of impeachment" (*Lopez v. United States,* 373 U. S. 437, 439).

We come, then, to the question of whether the fact that the recordings here involved were made not by police officers but by a private person, who turned them over to the state prosecutor, bars these petitioners from relief. That the action of a state court may afford basis for invoking the protection of the Fourteenth Amendment has been clear since *Shelley v. Kraemer,* 334 U. S. 1. More recently this Court has reversed state court cases on the ground that convictions unsupported by evidence must fall under the Fourteenth Amendment: *Thompson v. Louisville,* 362 U. S. 199; *Garner v. Louisianna,* 368 U. S. 157. Convictions supported by evidence tainted with illegality should likewise be declared invalid.

The use by state law enforcement officials of evidence against these petitioners which they knew had been obtained in violation of the public policy evidenced by the Communications Act of 1954, the Pennsylvania Anti-Wiretapping Act and orders of federal and state regulatory agencies constitutes sufficient state action to invoke the protection of the due process clause. Herein the state has become involved in the illegal act of a private individual in a manner prohibited to it: *Cf., Burton v. Wilmington Parking Authority*, 365 U. S. 715. The admission of illegally obtained evidence denied these petitioners that "fundamental fairness" mandated by the due process clause: *Lisenba v. California*, 314 U. S. 219.

Whether petitioners were also denied their basic constitutional right to privacy as protected by the Fourth and Fifth Amendments (*Mapp v. United States*, 367 U. S. 643, 656), would seem to depend upon where the line is to be drawn between evidence procured unconstitutionally and that obtained illegally. Insofar as this line is determined in wiretap cases by *Olmstead v. United States*, 277 U. S. 438, it rests upon a questionable basis. During the period since *Olmstead* was decided this Court has overturned the basic principles upon which the decision rested. No longer does this Court require that the fruits of the search be tangible to make Fourth Amendment guarantees applicable: *Irvine v. California*, 347 U. S. 128; *Wong Sun v. United States*, 371 U. S. 471. The amendment does not depend upon the doctrine of trespass under local property law: *Silverman v. United States*, 365 U. S. 505; *Chapman v. United States*, 365 U. S. 610. *Olmstead* and the decisions which rest upon it have been repeatedly and eloquently questioned in dissenting opinions, most recently in *Lopez v. United States*, 373 U. S. 427, 458-463, where three mem-

bers of this Court specifically recommended it be overruled.

A new dimension has been given to the problem of whether *Olmstead* should be overruled by *Mapp v. United States,* 367 U. S. 643. Insofar as the federal courts are concerned, since the passage of the Communications Act in 1934, wiretap evidence has been excluded, in the exercise of this Court's supervisory powers, because it was obtained illegally. It made not the slightest difference whether it was also obtained unconstitutionally. *Mapp,* however, made the exclusionary rule applicable only to evidence obtained in violation of a constitutional right. Overruling of *Olmstead,* whose foundations have already been so severely shaken, would bring to an end the unseemly spectacle of state courts affirming convictions secured by the use of wiretap evidence obtained in an unlawful manner, on the ground that constitutional rights were not involved.

Review of this case would afford an opportunity to reconsider the decision in *Olmstead v. United States,* 277 U. S. 438. It would also serve to answer some of the questions left unresolved by *Mapp v. United States,* 367 U. S. 643—*i. e.,* whether the exclusionary rule should be required where evidence is obtained illegally but not unconstitutionally, and whether a court-enunciated rule making admissible evidence obtained illegally by a private party meets the requirements of due process. Moreover, the troublesome questions arising out of equating mechanical and human witnesses would be reached in this case, at least insofar as the specially protected area of telephonic communication is concerned.

Because all of these propositions involve general matters of public policy which this Court must eventually determine,

petitioners submit that special and important reasons for review are present herein. Accordingly, certiorari should be granted.

Respectfully submitted,

MARJORIE HANSON MATSON,
Attorney for Petitioners.

APPENDIX

Opinion of the Superior Court.

MONTGOMERY, J.

These appeals by the defendants below from judgments of sentence following verdicts of guilty are based on the following indictments, identified by the number assigned to them at the 1961 January Session of the Quarter Sessions Court of Allegheny County:

(545) O. B. Bruno—seven counts of extortion and one of misdemeanor in office during 1958.

(546) O. B. Bruno and Orest Panza—extortion in 1958.

(547) William Neff—twelve counts of extortion is 1957.

(548) William Neff—eight counts of extortion and one count of misdemeanor in office in 1958.

(549) William Neff and Sam Ianuzzi—eight counts of extortion and one of misdemeanor in office in 1956.

(551) Stephen Zielinski—eight counts of extortion and one of misdemeanor in office in 1958.

The appellants were councilmen of the Borough of Sharpsburg, Allegheny County, when they allegedly committed the crimes charged aforesaid. The charges arose from transactions relating to the delivery of coal to the borough power plant under its contracts with Frank Panza.

Motions to quash the indictments were refused prior to trial and appeals from such actions were taken to this Court; but they were quashed as interlocutory. The same questions sought to be raised in those appeals are now before us and will be discussed initially. Appellants contend the indictments should have been quashed because (1) they

were not returned at the next term of court following the preliminary hearing; (2) the informations on which they were based fail to set forth the exact dates of the alleged acts of extortion and the precise amounts of money extorted; and (3) the informations on which they were predicated were signed by a private prosecutor on information received, without stating that he believed the facts to be true to the best of his knowledge.

(1) The court did not err in refusing to quash the indictments on the ground that they had not been returned at the next term of court following the preliminary hearing before the committing magistrate. The informations were dated September 19, 1960, and the preliminary hearing was held September 29, 1960. The committing magistrate sent them to the district attorney promptly; but they were not presented to a grand jury until that of January, 1961, which returned the indictments. Appellants contend that they were denied a substantial right, viz., the right to challenge the array of the January, 1961 grand jury, since they did not have notice of the fact that it was to consider the matters. However, they made no effort to challenge the array of the grand jury prior to trial, and they have not set forth in what manner they have been prejudiced. This same argument has been advanced under similar circumstances in other cases and has been rejected. It has been advanced in cases where the indictments were returned by a grand jury in session at the time of the transmission of the informations by the committing magistrate (a pending grand jury). *Commonwealth v. Bozzi*, 178 Pa. Superior Ct. 224, 116 A. 2d 290 (1955); *Commonwealth v. Magid and Dickstein*, 91 Pa. Superior Ct. 513 (1927). It also has been considered in cases where grand jury action was postponed and the indictments were returned by a subsequent grand jury. *Commonwealth v. Gross*, 161 Pa. Superior Ct.

613, 56 A. 2d 303 (1948); *Commonwealth v. Weiner*, 101 Pa. Superior Ct. 295 (1930). In some of those cases the fact of notice to the defendants of when their cases were to be considered by the grand jury was disputed. However, lack of notice has been held not to be prejudicial in itself because the defendant is privileged to challenge the array and formation of the grand jury at any time until a plea is entered or a jury sworn. *Commonwealth v. Gross, supra*. Therefore, in the present case, in the absence of any prejudice being shown and any attempt being made to challenge the array of the January, 1961 grand jury we also must hold this contention to be without merit.

(2) Appellants complain further that the informations on which the indictments were found were insufficient in that they contained blanks in relation to the precise amounts of money allegedly extorted and the precise dates on which they received the illegal payments. The informations charge that the defendants received money "in regular monthly payments beginning in ....., 1956, and continuing thereafter up to and including October 1958." Regardless of the omissions in the informations, the appellants entered bail for their appearances in court after they had had a preliminary hearing, and they did not object in any way to the preliminary proceedings until after they had been indicted. Therefore, they must be held to have waived any irregularities in the proceedings before the committing magistrate and cannot thereafter complain of the inadequacy of the informations. See *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 154 A. 2d 57 (1959), affirmed 399 Pa. 387, 160 A. 2d 467 (1960), cert. denied, 364 U. S. 899, 81 S. Ct. 233, 5 L. Ed. 2d 194, rehearing denied, 364 U. S. 939, 81 S. Ct. 377, 5 L. Ed. 2d 371; *Commonwealth v. Fudeman*, 50 Berks 142, quashed on appeal at 186 Pa. Superior Ct. 547, 142 A. 2d 473 (1958), affirmed

396 Pa. 236, 152 A. 2d 428, cert. denied, 361 U. S. 902, 80 S. Ct. 211, 4 L. Ed. 2d 157. See also *Commonwealth v. Murawski*, 101 Pa. Superior Ct. 430 (1931). Although an information must contain the essential elements of the offense sought to be charged, because the defendant should not be required to answer a charge different from and unrelated to the one for which he was arrested and held on bail, it need not set forth the charge with the same particularity and so fully and specifically, as the indictment. *Commonwealth v. Musto*, 348 Pa. 300, 35 A. 2d 307 (1944); *Commonwealth v. Cortes*, 182 Pa. Superior Ct. 602, 128 A. 2d 155 (1956); *Commonwealth v. Gross, supra.* The indictments are explicit in stating the amounts of money extorted and the dates on which the acts of extortion were committed; it is only the informations that do not so state. Furthermore, the hearing before the committing magistrate would have supplied this information.

(3) While the law is as contended by the appellants, that one who swears to an information on information received from others must also swear that he believes the information that he received, after a hearing and the posting of bond it is too late to question the information on that basis; and after indictment it is certainly too late. *Commonwealth v. Hunsicker*, 189 Pa. Superior Ct. 63, 149 A. 2d 584 (1959); *Commonwealth v. Weinstein*, 177 Pa. Superior Ct. 1, 109 A. 2d 235 (1954); *Commonwealth v. Murawski, supra.* The *Hunsicker* case, page 66, states, "These defendants when bound over to court might have raised the question of sufficiency, or the total lack of the evidence to hold them, on *habeas corpus*, but having given bail they can be discharged, before trial, for lack of evidence only by the grand jury."

The appellants contend that this defect in the information is jurisdictional and that the arrest was, therefore, in viola-

tion of art. I, § 8, of the Constitution of Pennsylvania and cite *Commonwealth v. Wiggins*, 54 Lanc. Rev. 11 (1954), in support thereof. In that case the defendant, who was prosecuted before a justice of the peace for reckless driving, had waived a hearing and had given bail. The court quashed the information and stated that the failure to swear that a charge based upon information received is believed by the affiant is a jurisdictional and not a procedural irregularity, which may be raised after a waived hearing. Neither the court in that case nor the appellants delineated what aspect of jurisdiction was involved. However, regardless of the illegality of the arrest, including complete absence of an information and a defective information, the committing magistrate and subsequently the court has jurisdiction over the person of the defendant. *Commonwealth ex rel. DiDio v. Baldi*, 176 Pa. Superior Ct. 119, 106 A. 2d 910 (1954). Even though a defective information is subject to review on a question of jurisdiction of the case or subject matter if brought in timely fashion, an indictment found regularly upon examination of witnesses will operate to correct any jurisdictional, as well as procedural, defects and irregularities in the information, warrant and proceedings before a magistrate. *Commonwealth v. Brennan*, 193 Pa. 567, 44 A. 498 (1899). Furthermore, it is well settled that the defects and irregularities in the information, warrant and proceedings aforesaid are waived by pleading to the indictment and going to trial. *Commonwealth ex rel. Lockhart v. Myers*, 193 Pa. Superior Ct. 531, 165 A. 2d 400 (1960), cert. denied, 368 U. S. 860, 82 S. Ct. 102, 7 L. Ed. 2d 57. None of the cases cited by appellants conflict with these principles. In *Commonwealth v. Imboden*, 6 Lebanon County Legal Journal 180 (1957), and *Commonwealth v. Wiggins, supra*, the informations were attacked prior to indictment. *Commonwealth v. Hockenberry*, 72 Pa. D. & C.

274 (1950), and *Commonwealth v. Webber*, 95 P. L. J. 272 (1946), involved summary convictions for vehicle code violations and held that convictions based on defective informations in those circumstances were subject to attack at any time. Thus, in those cases no grand jury proceedings were involved. *Commonwealth v. Deppen*, 52 Pa. D. & C. 442 (1944), is illustrative of the principle that the regular grand jury proceedings cure a defective information.

Therefore, we conclude that this contention also is without merit.

Facts

The facts on which the verdicts of guilty were predicated may be succinctly stated as follows: Each year the contract for supplying coal was advertised by the Borough of Sharpsburg for public bids. In March, 1956, Frank Panza, having submitted a bid, which was determined to be lowest responsible offer, was awarded the contract. Payments for amounts due under the contract were made monthly, beginning in April and continuing through November of that year, when a new contract was made. Payments were made only after samples of the coal had been tested. The tests were made by taking samples from each load as delivered, placing them in a can, mixing and grinding them, and submitting the resulting combined sample to the Pittsburgh Testing Laboratory. If the test measured up to the established standard, payment was made; and if not, a penalty might be imposed. It was possible to tamper with the samples and to alter them so as to make it appear that the coal was inferior in character. Defendants Neff and Ianuzzi (Iannuzzi, Iannuz[illegible]) advised and threatened Panza to the effect that, if he did not favor them by way of kickbacks in the sum of twenty-five cents per

ton, which was one half of his profits, that his payments would be held up and penalties would be imposed. Responding to that threat, Panza delivered a sum of money in four different envelopes to Ianuzzi's cleaning establishment each month; and on some occasions delivered them personally to Ianuzzi or Neff.

In November, 1956, Frank Panza was awarded a new contract; and the same threat by Ianuzzi and Neff was made, resulting in similar payments during the year 1957. Although Ianuzzi was not indicted for extortion during 1957, it was established that he received certain sums of money each month at his place of business and that that money was delivered in four envelopes for Neff and himself and two other persons, later identified as Orest Panza and Zielinski, defendants.

In November, 1957, another new contract was entered into between the borough and Panza. Panza continued to make such payments and, beginning in February, 1958, he began to make payments to Bruno.[1] These payments to Bruno, Neff, Zielinski and Ianuzzi continued until August of 1958. A false analysis of Panza's coal for the month of December, 1958, after he had stopped payments, showed that it was inferior to specifications; and a penalty of $3,800 was imposed on him. When he complained and the matter of this penalty was brought before the council publicly, Orest Panza and Bruno advised him that they would secure the payment of the entire contract price (thus securing a waiver or return of the penalty) but that he would be required to pay them $350 each. Orest Panza and Bruno advised Panza that they could do this because of their

[1] The payments of twenty-five cents a ton were always divided into four parts. It is not clear at times which of the five named defendants may not have received a part. However, each received a part at sometime during the periods covered by the several indictments.

official position as councilmen. In response to this suggestion Panza did pay each of them $350.

In establishing the facts, the Commonwealth offered evidence of a witness Kaminski who testified that prior to 1956, as a broker, he had negotiated a contract between the Borough of Sharpsburg and Raymond Kutsch for delivery of coal to the borough for the purposes of the power plant, and that Kutsch had allowed him a brokerage fee of forty cents a ton, from which he paid Neff and Bruno, during the life of this contract, monthly sums of money under the threat that unless payments were made the analysis of the coal would be tampered with and penalties would be imposed. Kaminski also testified that during this period he had called Bruno and Neff on several occasions and talked with them about the payment of this money in avoidance of a penalty, and that during these conversations he, Kaminski, had held near the receiver of his telephone a microphone which was attached to a tape recording machine. This tape recording was offered in evidence and heard by the jury. Appellants complain that the admission of this evidence of Kaminski, including his testimony as to his prior relationship with Neff and Bruno, as well as the tape recording, was error. Further, when this evidence was offered before the jury, counsel for Orest Panza, Zielinski, and Ianuzzi asked the court for a severance of their cases from that of Neff and Bruno, which motion was refused. This is also contended as being in error and prejudicial. Although all of these cases were consolidated for trial and involved different defendants, there had been no previous request for a severance.

Generally, evidence of distinct crimes not connected with those charged in the indictment on trial cannot be received. However, evidence of offenses other than the one charged

in the indictment is admissible when such evidence shows motive, plan, design and scheme or common purpose previously conceived and in part executed. *Commonwealth v. Ross*, 413 Pa. 35, 195 A. 2d 81 (1936).

We have no difficulty with the conclusion that the evidence disclosed the common purpose, design, and scheme on the part of Bruno and Neff to secure money from various contractors dealing with the Borough of Sharpsburg in the supplying of coal, and that such scheme was executed to some extent. However, such scheme, during the time Kaminski was involved with the contractor, did not involve the other defendants, Ianuzzi, Orest Panza and Zielinski. Although the record of testimony has not been printed, we have examined the original record and note that when the testimony of Kaminski was received it was expressly limited in its effect to the charges against Neff and Bruno. The jury was expressly told that it was to have no effect or bearing on the indictments against the other defendants.[2] Likewise, in the charge of the court, the jury was similarly instructed.[3]

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[2] "Mr. Gondelman: If the Court please, at this time I ask that any testimony of this witness concerning a conversation with O. B. Bruno be limited to the defendant, and that the jury be instructed now that they cannot apply [it] to any other defendant.

"The Court: That is correct. You heard what Mr. Gondelman said. Of course, any statement made by Mr. O. B. Bruno would not be evidenced against any other defendant in itself, only be evidence against him, that is, Bruno." (Original record, pages 416, 417.)

"Mr. Gondelman: Pardon me, Mr. Schmitt, but I object to the statement what the others were getting as applying to these defendants as being hearsay.

"The Court: It certainly is objectionable so far as applying to any defendants in this case because it cannot be evidence against them, but I think he does have the right to state, when he says there might have been others without certainly indicating who they were, because certainly it would be no evidence whatsoever, proper evidence, against any person excepting Mr. Bruno himself. But as to his reason here, I think you can show that without it being evidence against any of the other defendants in this case. I think you have a right to state that. We will overrule the objection to that extent. Now go ahead. Allow an exception and go ahead now." (Original record, pages 418, 419.)

[3] "I emphasize that this evidence is only introduced against two of these defendants, Orest Panza [Neff (subsequently corrected by the court)] and O. B. Bruno, and you must not consider it as against any of the others, it is not evidence at all against them." (Original record, page 1118.)

Under the circumstances, we conclude that the other defendants were not prejudiced to such an extent as to warrant the grant of a new trial for this reason. See *Commonwealth v. Silia*, 194 Pa. Superior Ct. 291, 166 A. 2d 73 (1960); *Commonwealth v. Grosso*, 192 Pa. Superior Ct. 513, 162 A. 2d 421 (1960).

The same objections were made to the offer of the recording made by Kaminski as were made to his oral testimony, viz., (1) it was prejudicial to the other defendants, Ianuzzi, Zielinski, and Orest Panza; (2) it did not pose a separate and distinct crime which might establish a common plan, purpose, or design.

We need not repeat our previous discussion in relation to the testimony of Kaminski. It was limited to Neff and Bruno, as was the recording.

Although a distinct crime cannot be given in evidence against a defendant who is being tried for another crime, except under certain special circumstances, we have not seen a case which holds that the earlier crime must be identical in character with the later one. What is meant by special circumstances is expressed in *Commonwealth v. Burdell*, 380 Pa. 43, 110 A. 2d 193 (1955), page 47: "It is held that such evidence is admissible only where the former alleged crime or crimes are of the same nature as the one under trial and indicate a general intent or design on the part of the accused to conduct, for example, a series of similar robberies, or murders, or sex offenses, or poisonings of persons in order to obtain their insurance money, or the like; in other words, the prior criminal act or acts are evidential only if clearly constituting part of a chain, system, composite plan or scheme." It is noted that the statement does not use the word identical, but similar. In that case, extortion and robbery were held not to be similar.

However, see *Commonwealth v. Morrison*, 266 Pa. 223, 109 A. 878 (1920); *Commonwealth v. Bufalini*, 200 Pa. Superior Ct. 85, 186 A. 2d 645 (1962); *Commonwealth v. Grosso, supra.*

We are of the opinion that the acts of Neff and Bruno in 1955 fall within the rule as to what constitutes "special circumstances" making such evidence admissible.

As to the other reason, appellants contend that the testimony of Kaminski and Kutsch, as well as the recording, related to a contract other than the ones on which the defendants were indicted and that any payments made by Kaminski to Neff and Bruno from money received from Kutsch were not received by Neff and Bruno under color of office. Therefore, they argue, proof of such payments did not show a course of conduct similar to that for which appellants were being tried, namely, for extortion by color of office. We fail to see the nice distinction urged by the appellants. Whether Neff or Bruno, councilmen of Sharpsburg Borough, accepted illegal payments directly from Kutsch, who was the contractor, or from Kaminski, who was the broker who had negotiated that contract, the payments were made and received in connection with a matter in which the Borough of Sharpsburg was interested, its contract for coal. Appellants argue that if any pay-offs were made, Kutsch had no knowledge of them. We, likewise, fail to see the importance of this fact. If Neff and Bruno, as councilmen, extorted money from Kaminski which he had received from Kutsch for negotiating the contract for the latter, the effect of the action of Neff and Bruno was to demand and accept money under threat of interfering with that contract, to the detriment of both Kutsch and Kaminski. Of course, it was a contract other than the ones on which these indictments were predicated.

Nevertheless, it involved the same subject matter—the supplying of coal to the borough.

Nor do we find any merit in appellants' contention that the recording of the telephone conversation between Kaminski and Neff and Bruno was erroneously admitted into evidence. Telephone conversations generally are admissible if there is proper identification of the voice. *Limestone Products and Supply Company v. Tom Brown, Inc.*, 198 Pa. Superior Ct. 375, 181 A. 2d 696 (1962). This was not an interception of a message as intended by the Act of July 16, 1957, P. L. 956, No. 411, § 1, 15 P. S. § 2443. *Commonwealth v. Smith*, 186 Pa. Superior Ct. 89, 140 A. 2d 347 (1958). It was the recording of a message by the rightful receiver of it, free from any restrictions as to divulgence. The United States Supreme Court has held that it is proper to admit in evidence wire recordings made under similar circumstances, *Lopez v. United States*, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963), and telephone conversations, heard by third parties with the consent of the originally intended receiver, *Rathbun v. United States*, 355 U. S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957). See *Rayson v. United States*, 238 F. 2d 160 (1960), for a situation identical with our present one.

We do not deem it necessary to rule on the P. U. C. regulation requiring a "beep" signal when telephone conversation are recorded.[4] A similar regulation of the F. C. C.

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[4] "E. Connection with Customer-Owned Voice Recording Equipment.

1. Regulations.

A. General

Customer-owned voice recording equipment for the recording of telephone conversation may be used in connection with the telephone lines, except coin box telephone lines, of the Telephone Company subject to the following conditions:

(1) *Connection with Telephone Company Facilities*

(a) Connection of customer-owned voice recording equipment with the facilities of the telephone company shall be made only *through recorder con-*

(Footnote continued on following page)

was ignored in the *Rathbun* case. Furthermore, prior to *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the admissibility of evidence was not affected by the means by which it was secured.[5] *Mapp* dictated the adoption of the exclusionary rule for states if there had been a violation of a constitutional right in the procuring of the evidence. We see no such right involved in a violation of a rule of the Pennsylvania Public Utility Commission, if the situation in the present case should be considered such a violation. The regulation appears to be more for the benefit of the telephone company than for the parties to the conversation.

Severance

The consolidation or separation of indictments is a matter for the trial judges, whose conclusion will be reversed

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(Footnote continued from preceding page)

nector equipment which contains a recorder tone device automatically producing a distinctive recorder tone that is repeated at intervals of approximately fifteen seconds when the recorder equipment is in use, *except that, in the case of telephone lines which have no connection with the exchange or toll system of the Telephone Company, recorder connector equipment which does not contain the automatic tone device may be used at the option of the customer.* (Emphasis supplied.)

(b) Permanent connection shall be made only through recorder connector equipment furnished, installed, and maintained by the Telephone Company.

(c) Connection may be made through portable recorder connector equipment provided such equipment is obtained from and is maintained by the Telephone Company. The portable recorder connector equipment shall be connected with the telephone line through jacks installed by the telephone company on each line or at each station used for recording purposes, except that where recording is done at a cord switchboard, a portable jack box supplied and maintained by the Telephone Company may be used.

(d) The customer-owned voice recording equipment shall be so arranged that at the will of the user it can be physically connected to and disconnected from the facilities of the Telephone Company or switched on and off." Local General Tariffs, Pennsylvania, Public Utilities Commission No. 1, Section 26, Sheets 19 and 20.

[5] *Commonwealth ex rel. Williams v. Myers*, 193 Pa. Superior Ct. 110, 162 A. 2d 419 (1960), cert. denied, 364 U. S. 924, 81 S. Ct. 290, 5 L. Ed. 2d 263; *Commonwealth v. Voci*, 185 Pa. Superior Ct. 563, 138 A. 2d 232 (1958), affirmed 393 Pa. 404, 143 A. 2d 652, cert. denied, 358 U. S. 885, 79 S. Ct. 119, 3 L. Ed. 2d 113; *Commonwealth ex rel. Keffel v. Myers*, 184 Pa. Superior Ct. 270, 133 A. 2d 570 (1957), cert. denied, U. S. 918, 78 S. Ct. 349, 2 L. Ed. 2d 278; *Commonwealth v. Chaitt*, 176 Pa. Superior Ct. 318, 107 A. 2d 214 (1954), affirmed 380 Pa. 532, 112 A. 2d 379, cert. denied, 350 U. S. 829, 76 S. Ct. 59, 100 L. Ed. 740.

only for obvious abuse of discretion or prejudice to the defendant. *Commonwealth ex rel. Bolish v. Banmiller*, 396 Pa. 129, 151 A. 2d 480 (1959); *Commonwealth ex rel. Lockhart v. Myers, supra.* Furthermore, a motion for severance made after the trial has proceeded and the testimony of several witnesses has been taken is untimely. *Commonwealth v. Flaherty*, 167 Pa. Superior Ct. 19, 74 A. 2d 506 (1950); *Commonwealth v. Dugan*, 167 Pa. Superior Ct. 22, 74 A. 2d 508 (1950). The court did not abuse its discretion in refusing a severance in this case and adequately protected the rights of those defendants not referred to in the testimony of Kaminski or his recording, as previously discussed.

Sufficiency of Evidence to Convict Defendants of Statutory Extortion Under Act of June 24, 1939, P. L. 872, § 318, 18 P. S. § 4318—or of Common Law Offense of Misdemeanor in Office

Defendants contend that evidence is lacking to prove that they took money from Panza under color of their office. They argue that since the contracts had been legally awarded, the councilmen had no further power to interfere with them and, therefore, could not have committed the crime of statutory extortion. Although they deny that they had access to the coal samples or an opportunity to tamper with them and that the matter of analysis was entirely in the hands of the Pittsburgh Testing Laboratory, an independent agency, we find in the record evidence to the contrary. Mr. Panza testified that he had delivered premium coal to the borough and that inferior coal samples had been substituted for the premium coal samples before the analysis was made by the Pittsburgh Testing Laboratory, which resulted in penalties of over $3,800 being imposed on him. There is also evidence that Panza,

in talking to the defendants at various times about the analysis of the coal, was told that they could make it rough on him if he did not divide his profit with them. From this evidence the jury could have found that the defendants did have some control over and access to the samples of coal used for the analysis.

However, of equal or greater importance in the disposition of this issue is the fact that the monthly bills submitted by Panza were subject to approval for payment by defendants, who also had control over the matter of imposition of penalties. Although penalties of over $3,800 were imposed as a result of the false analysis, this was refunded to Panza by action of the council after he had agreed to pay $700 to Orest Panza and Bruno, two members of that council. Contrary to appellants' argument, it is difficult for us not to conclude that the payments received by them from Panza were made because of the influence they had as members of the borough council and that they were received by them under color of that office.

Although the office of councilman does not involve the payment or receipt of fees, this is unimportant since the statute covers situations wherein a public officer takes fees or rewards *not allowed by law* as well as the taking of more benefits *than is allowed by law.*

It is not contended that councilmen are not such public officers who may be guilty of this crime or that the evidence is not sufficient to prove payments made to them. Therefore, since we are satisfied that each of the defendants received the payments "by color of his office", we reject their contention and hold it to be without merit. *Commonwealth v. Channing*, 55 Pa. Superior Ct. 510 (1914), relied on by appellants, is not to the contrary. In fact, it may be cited in support of our conclusion since it defines, at page

516, an act done "by color of his office" as "a pretense of official right to do an act, made by one who has no such right; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act; an act wrongfully done by an officer under the pretended authority of his office:". The acts of these defendants are covered by those definitions.

Finally, appellants contend that the common-law crime of misdemeanor in office insofar as borough councilmen are concerned has been abrogated by the Borough Code, Act of May 4, 1927, P. L. 519, art. XIII.I, § 1317, added July 10, 1947, P. L. 1621, § 42, 53 P.S. § 46317, which makes it a misdeameanor for such offenses to be interested directly or indirectly in any contract for materials or labor furnished the borough. In support of this argument appellants cite *Commonwealth v. Peoples*, 345 Pa. 576, 28 A. 2d 792 (1942), wherein city councilmen passed a resolution fixing the salaries of its members of the Chester Municipal Authority to which they had previously elected themselves members. In that case our Supreme Court said, page 579, "The law is clear that misfeasance in office means either the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive: McNair's Petition, 324 Pa. 48; Commonwealth v. Hubbs (No. 2), 137 Pa. Superior Ct. 244. Such offense is not indictable under the common law, however, 'where a remedy is provided or duty enjoined, or anything directed to be done by the penal provisions of any act of assembly', unless necessary 'for carrying such act into effect': Penal Code, Act of June 24, 1939, P. L. 872, section 1104."

Although defendants are not charged with being directly interested in the contracts for the supplying of coal, they

are charged with extortionately demanding from Panza fees and rewards based on the tonnage of such material furnished with the knowledge that Panza had been officially awarded such contract.

The Commonwealth argues that the aforesaid code provision means that the official must not be interested in the contract itself, as distinguished from the profits realized from same by the supplier after it has been performed by him. Arguing further, it contends that the prohibition relates to the act of voting on such contracts. This nice distinction is not acceptable. By the illicit arrangement with Panza, defendants become interested in each new contract made with Panza for supplying coal. Furthermore, they were interested in the proceeds at the time they approved his bills for payment. Whether their arrangement with Panza was legal or illegal would not be material. In *Commonwealth ex rel. v. Elliott*, 291 Pa. 98, 139 A. 626 (1927), a borough councilman who worked for the one who had contracted for the borough was held within the prohibition of the statute of May 28, 1907, P. L. 262. Although that statute specifically covered employees of contracting parties who were also officials and the present statute excludes them if they disclose their relationship and do not vote, these defendants did not bring themselves within that exclusion. See also *Commonwealth ex rel. Whitehouse v. Harris*, 248 Pa. 570, 94 A. 251 (1915).

We conclude that the appellants were subject to the penalties imposed by the Act of June 24, 1939, P. L. 872, and for that reason were not guilty of the common-law offense.

The judgments of sentence against all appellants are affirmed on all charges of extortion; but the judgments are

reversed as to all appellants on the charge of misdemeanor in office and they are discharged from same;

It is further ordered that the appellants appear before the court below as such time as that court may call them and that they be committed by that court until they have complied with their sentences on the charges of extortion or any part thereof which had not been performed at the time these appeals were made a *supersedeas.*

Order of the Pennsylvania Supreme Court Denying Allocatur.

July 31, 1964. Petition Denied. *Per Curiam.*

Pennsylvania Anti-Wiretapping Act.

Act of July 16, 1957, P. L. 956, 15 P. S. 2443.

"No person shall intercept a communication by telephone or telegraph without permission of the parties to such communication. No person shall install or employ any device for overhearing or recording communications passing through a telephone or telegraph line with intent to intercept a communication in violation of this act. No person shall divulge or use the contents or purport of a communication intercepted in violation of this act. Whoever wilfully violates or aids, abets or procures a violation of this act is guilty of a misdemeanor, and shall be punishable by imprisonment of not more than one year, or by fine of not more than five thousand dollars ($5000), or both, and shall be liable to any person whose communication is unlawfully intercepted or divulged for treble the amount of any dam-

age resulting from such unlawful interception, divulgence or use, but in no event less than one hundred dollars ($100) and a reasonable attorney's fee. The term "person" includes natural persons, business associations, partnerships, corporations, or other legal entities, and persons acting or purporting to act for, or in behalf of, any government or subdivision thereof, whether Federal, State or local. The term "divulge" includes divulgence to a fellow employe or official in government or private enterprise or in a judicial, administrative, legislative or other proceeding. Except as proof in a suit or prosecution for a violation of this act, no evidence obtained as a result of an unlawful interception shall be admissible in any such proceeding * * *"

Communications Act of 1934.

47 U. S. C. 605, c. 652, 48 Stat. 1103.

"§ 605. UNAUTHORIZED PUBLICATION OR USE OF COMMUNICATIONS

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand

of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."